Filed 10/22/15 Cisneros v. The Lost Isle Partners CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DELIA CISNEROS et al., Plaintiffs and Appellants, v. THE LOST ISLE PARTNERS, et al., Defendants and Respondents.	H040346 (Santa Clara County Super. Ct. No. 109CV 153416)

Plaintiffs Delia and David Cisneros appeal from a judgment entered after a grant of summary judgment to Lost Isle Partners and its general partner, David G. Wheeler, owners of Lost Isle, where plaintiffs' son, Joseph, was stabbed to death one summer evening in 2008. Plaintiffs contend that a trial was required on their claims for negligence and premises liability, because there were triable issues of fact pertaining to (1) defendants' duty to protect Joseph and (2) a causal nexus between defendants' duty as a "bar owner" and Joseph's death. We agree that triable issues remain and therefore must reverse the judgment.

Background

Lost Isle, an adults-only island "resort"[1] accessible only by boat, housed a restaurant and two bars. On a typical weekend there would be at least eight security

[1] In their opposition to summary judgment, plaintiffs disputed defendants' reference to Lost Isle as a resort. The superior court declined to take judicial notice of its designation as a resort, and on appeal plaintiffs persist in calling it a "bar." They have not, however, controverted the testimony that the San Joaquin County Planning (continued)

personnel on the premises, two covering each of the three gates plus two "rovers," though the number would fluctuate with the resort's needs. The policy at the resort was to check arriving patrons' identification and search bags and backpacks for alcohol before allowing anyone on the premises. Other staff members helped the guards with this function when needed. Although the resort had a policy forbidding weapons on the island, security staff did not perform a formal weapons check on patrons as they entered, either by a metal detector or a pat-down; most entered wearing "swimsuit attire" that made it easy for staff to spot anything bulky in a pocket, and if they saw a weapon in their search of a purse or backpack, it would be removed.

In the afternoon of August 2, 2008 Joseph and four companions, including Michael Alarcon and his nephew, Ernesto Alarcon (Ernesto), arrived at Lost Isle by boat. One witness, Charles Buckerfield, estimated that there were fewer than 50 people on the island; Blane Hamilton, a Lost Isle employee, gave 150 as his "best estimate." Hamilton also estimated that there were eight to 10 security personnel that day, "probably closer to ten"; security guard Richardo Rizzonelli placed that number at eight.[2]

At around 6:30 p.m. Rizzonelli was working at the main dock gate when he was alerted by David Van Noy, the bar manager, that "there's a fight about to break out over there." Rizzonelli saw two individuals who were arguing about 30 feet away. Within a couple of seconds he reached the two men, but as he approached them they fell to the ground, punching each other.

Rizzonelli did not have a two-way radio, though some of the security personnel did. When he reached the men he was about to jump in between the two and pull them

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Commission designated Lost Isle as a resort. For purposes of this appeal, the accuracy of the label is immaterial.

[2] Plaintiffs assert that only five security guards were on duty that day. No record citation is offered for this statement. Security guard Antonio Elizondo, however, recalled five security personnel working on the premises that day between 5:00 and 6:00 p.m.

apart, but after another couple of seconds, a third person, believed to be Javier Jimenez, ran by, and as the two men began to get up, Jimenez stabbed Joseph quickly three times in the side.[3] Rizzonelli estimated that less than a minute elapsed between the time he was informed that a fight was about to break out and the time the stabbing occurred.

Van Noy similarly testified that he told Rizzonelli that they should "watch these guys. Something's happening or could happen"; but by the time they turned around, Joseph had been stabbed. James Saculla was alerted by radio that "some type of incident" was happening which required "all security available" to respond. Upon his response, which "was pretty much immediate," he saw Joseph bleeding and people trying to get him to calm down, to subdue him. Saculla then saw Ernesto, who had also been wounded, and he stayed to attend to him.

After stabbing Joseph, Jimenez held the knife toward Rizzonelli, who backed up with his hands in the air. Rizzonelli tried to get Joseph, who was bleeding from the three wounds, to lie down. Van Noy and a patron grabbed Jimenez's arms, but both let go because Jimenez was still holding the knife. Then Jimenez ran away, jumped into a boat, cut the ropes, and left. Joseph, who was "very intoxicated" and appeared not to realize that he had been stabbed, ran down to the water and fell in, all the while trying to fight off people around him. Joseph resisted Van Noy, who was trying to help him, but eventually some other Lost Isle staff helped Joseph out of the water. Jerry Powell, one of the patrons, estimated the entire incident, including Jiminez's escape to the dock area, to be about five minutes.

Michael and Ernesto Alarcon were at the "tiki bar" when they saw Joseph and another man talking. It did not appear to be an argument; but when Ernesto intervened a

[3] Van Noy believed that the person who did the stabbing was Jimenez, or "Jiminez," but he had been standing against a wall, surrounded by five "Mexicans," rather than having run to Joseph from the side.

fight ensued, resulting in a stabbing wound to Ernesto. Earlier Michael Alarcon had seen that man, who was a tall Caucasian with short hair, in the bathroom; the man had "exchanged some words" with Joseph.

Katherine Hamilton, a cook at the resort, heard yelling and saw a tall "dirty blon[d] guy" jabbing at a shorter Hispanic man, evidently Ernesto. The tall man ran away, and within four seconds of the yelling Hamilton arrived at the shorter man's side and began rendering first aid along with one of the bartenders.

Joseph was described as a "big guy," 160 kilograms. When paramedics arrived by helicopter, he was bleeding profusely from his wounds. Medical personnel attempted to stabilize Joseph and when his pulse stopped, administered CPR. Once the helicopter reached San Joaquin General Hospital, CPR was continued, but Joseph's condition had deteriorated, and at some point thereafter he was pronounced dead.

Plaintiffs filed their complaint on September 25, 2009, asserting general negligence and premises liability. Defendants answered the complaint, and in May 2013 they moved for summary judgment or, alternatively, summary adjudication of issues.[4] After ruling on several evidentiary issues, the superior court granted defendants' motion, finding no triable issue of fact on the elements of duty and causation in either of plaintiffs' two causes of action. From the ensuing judgment on September 6, 2013, plaintiffs filed this timely appeal.

Discussion

Plaintiffs present two general issues on appeal. First they contend, as they did below, that there was a triable issue of fact on whether defendants owed a duty to take

[4] Although most of the 14 issues defendants proposed as a basis for summary adjudication pertained to questions of duty or causation, some were improperly proffered. Summary adjudication may be granted "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code of Civ. Proc. § 437c, subd. (f)(1).)

several specific security measures to protect Joseph, because prior similar incidents created a " 'heightened' and 'regular' foreseeability of fights at Lost Isle" and because personnel were aware that this attack was imminent. Plaintiffs further contest the court's exclusion as inadmissible hearsay of a sheriff's summary of past "calls for service" in the Lost Isle area between January 1, 2001 through May 20, 2009.

1. Standard and Scope of Review

In reviewing the superior court's rulings, we adhere to established principles of review. Summary judgment is proper if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

As the moving party, it was defendants' initial burden to show that plaintiffs' action had no merit—that is, "that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subds. (a), (p)(2).) Defendants' obligation was thus to "present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or . . . establish that an element of the claim cannot be established, by presenting evidence that the plaintiffs '[do] not possess[,] and cannot reasonably obtain, needed evidence' " to support a necessary element of the cause of action. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003, quoting *Aguilar*, *supra*, 25 Cal.4th at p. 854; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

If a moving defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Quintilliani v. Mannerino*

(1998) 62 Cal.App.4th 54, 59-60.) However, if the defendant makes a prima facie showing that justifies a judgment in its favor, the burden then shifts to the plaintiff to make a prima facie showing that there exists a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).)

Our review of a summary judgment ruling is de novo. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334; *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 58.) We view the evidence "in a light favorable to plaintiff[s] as the losing party [citation], liberally construing [their] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff[s'] favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) "We need not defer to the trial court and are not bound by the reasons for the summary judgment ruling; we review the ruling of the trial court, not its rationale." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85.)[5]

In reviewing the exclusion of the summary of "calls for service" to the sheriff's department, we apply a different standard. Plaintiffs insist that evidentiary rulings in summary judgment proceedings must be reviewed de novo. We follow the weight of authority, however, which adheres to an abuse-of-discretion standard when the trial court has actually ruled on an evidentiary issue. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; accord, *Miranda v. Bomel Construction Co., Inc.* (2010) 187

[5] In light of this tenet, it is unnecessary to address plaintiffs' assertion that the superior court failed to adhere to the procedural steps for evaluating duty, as discussed in *Casteneda v. Olsher* (2007) 41 Cal.4th 1205, 1214 (*Casteneda*).)

Cal.App.4th 1326, 1335; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.)

2. Plaintiffs' Complaint

Because summary judgment review is defined by the issues raised in the pleadings, we first direct our attention to the material allegations of plaintiffs' complaint. In the first cause of action for premises liability, plaintiffs alleged that defendants "failed to provide adequate security, were negligent in their training of security personnel, and/or failed to protect patrons from the foreseeable criminal acts of third parties, as they allowed an armed individual to return to the resort after he engaged in a violent altercation with decedent. When the individual returned to the resort, he stabbed and killed decedent, thereby causing injury to Plaintiffs DELIA and DAVID CISNEROS."

In the second cause of action for "General Negligence," plaintiffs asserted defendants' liability "for the wrongful death of Joseph Cisneros on the basis that they breached their duty to protect visitors from the foreseeable criminal acts of third parties . . . They also breached their duty to protect patrons by failing to have adequate medical facilities on the resort and/or helipad or other means of transporting seriously injured patrons. [¶] Defendants . . . are liable to Plaintiffs for the wrongful death of Joseph Cisneros for their failure to act reasonably under existing conditions, thereby causing injury to Plaintiffs DELIA and DAVID CISNEROS."[6]

3. Duty of a Commercial Property Owner

As plaintiffs' action sounded in negligence, their ultimate burden at trial would have been to prove that defendants owed Joseph a legal duty, that defendants breached that duty, and that the breach proximately caused the stabbing and resulting death of Joseph. (See *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264 (*Morris*).) As discussed

[6] The adequacy of medical staff and facilities, though litigated below, is not renewed as an issue on appeal.

above, it was defendants' burden in moving for summary judgment to present admissible evidence that plaintiffs could not establish one or more elements of negligence. (*Id*. at p. 265.) The primary issue, the existence and scope of defendants' duty, is a question of law, and is therefore "particularly amenable to resolution by summary judgment." (*Parsons v. Crown Disposal Co*. (1997) 15 Cal. 4th 456, 465; *J.L. v. Children's Institute, Inc*. (2009) 177 Cal. App. 4th 388, 396.); *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 (*Ann M*.); *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237 (*Delgado).*)

The parties agree that a business proprietor such as a bar or restaurant owner holds a special relationship with its patrons, which incorporates a duty to take reasonable steps to protect invitees from *foreseeable* criminal acts of third parties. (*Delgado, supra,* 36 Cal.4th at p. 235; *Castaneda, supra*, 41 Cal.4th at p. 1213.) "[F]oreseeability is a crucial factor in determining the existence of duty." (*Ann M., supra*, 6 Cal.4th at p. 676.) In other words, "a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ibid*.)

As our Supreme Court has repeatedly explained, "when determining the existence and scope of the duty to protect business invitees from the criminal conduct of third parties, the court balances the foreseeability of the harm against the burden of the duty. If the burden is great, a high foreseeability of harm may be required, but a lesser degree of foreseeability may be required if ' " ' "there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means." ' " ' " (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819, quoting *Ann M. supra*, 6 Cal.4th at p. 679.) "Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures. [Citation.]" (*Ann M., supra*, at p. 679; *Delgado, supra*, 36 Cal.4th at pp. 237-238; *Castaneda, supra*, 41 Cal.4th at p. 1213.) Thus, " 'imposition of a high burden requires

heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability.' " (*Morris, supra*, 36 Cal.4th at p. 271.)

"With respect to third party criminal conduct, our past decisions have noted a distinction between (1) a business's duty to take precautionary steps, in advance of any specific criminal activity, to provide protections to its patrons against criminal conduct that may occur in the future and (2) a business's duty to take immediate action in response to ongoing criminal activity that threatens the safety of its patrons. (See, e.g., *Delgado, supra*, 36 Cal.4th at pp. 240-242; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 271." (*Verdugo v. Target Corp.* (2014) 59 Cal. 4th 312, 337.) In a business such as Lost Isle, it is clear from *Delgado* and *Morris* that "even if a proprietor . . . has no special-relationship-based duty to provide security guards or other similarly burdensome measures designed to prevent *future* criminal conduct (which measures are required only upon a showing of 'heightened foreseeability'), such a proprietor nevertheless owes a special-relationship-based duty to undertake reasonable and minimally burdensome measures to assist customers or invitees who face danger from imminent or ongoing criminal assaultive conduct occurring upon the premises." (*Morris, supra*, at p. 270.) The proprietor thus is liable if it fails to respond to "imminent or ongoing criminal assaultive conduct occurring in the proprietor's presence," by means of a warning or " 'other reasonable and appropriate measures to protect patrons or invitees . . . .' " (*Ibid.*, citing *Delgado, supra*, at p. 241.)

When a proprietor has employed a security guard, as in this case, foreseeability "remains relevant in determining the existence and scope of any duty . . . to warn of dangers or to take appropriate measures to protect patrons or invitees from *ongoing* or *imminent* criminal conduct." (*Delgado, supra*, 36 Cal.4th at p. 248.) Our high court has also deemed foreseeability in these circumstances to be relevant to the fact finder's determination of breach and causation. (*Id.* at p. 250.) Furthermore, although the existence and scope of the proprietor's duty is a question of law, foreseeability is an issue

for the trier of fact; it may be decided as a question of law only if the undisputed facts show that there is no room for a reasonable difference of opinion. (*Silva v. Union Pacific Railroad Co*. (2000) 85 Cal.App.4th 1024, 1029; *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 69.)

There can be no question in this case that defendants held a special relationship with Joseph, an invitee of the resort, and had a concomitant duty to undertake reasonable and minimally burdensome measures to maintain security at Lost Isle. In addressing the scope of defendants' duty with respect to criminal conduct, plaintiffs contended that defendants should have (1) implemented enhanced security measures in employing and training their security guards because the stabbing of Joseph was highly foreseeable, and (2) responded more quickly to the imminent assault on Joseph. Among the additional measures defendants should have taken, according to plaintiffs, were the use of metal-detecting wands, pepper spray, and two-way communication devices, or "walkie talkie[s]," for all guards.[7] Guards also should have received training that "might have assisted them in preventing or stopping a fight."

3. Defendants' Showing

In their motion defendants argued that because there were no prior similar incidents at Lost Isle, they had no duty to take any intrusive security measures beyond their existing practice of inspecting customers' backpacks and purses and checking their identification.[8] They further maintained that security personnel had acted promptly to

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[7] Both Rizzonelli and Van Noy testified that there were not enough walkie-talkies to go around. When Van Noy had one, however, he used it.

[8] Plaintiffs did not dispute the resort's practice of inspecting bags and backpacks upon entry, but they did question why staff did not perform pat-downs for weapons. Plaintiffs' challenge to this point, however, was only to point out the fact, which defendants themselves provided, that fishing knives had been confiscated in the past on a "couple of" occasions. Jason Bertorelli testified that those knives were visible, as they were kept exposed on the patron's hip. Joshua Dillard testified that it was only "once or twice" that he turned away a patron for having a fishing knife.

intervene once they became aware of an imminent fight. Finally, defendants contended that the undisputed evidence showed that additional security would not have averted the knife attack.

In support of these assertions, defendants offered the deposition testimony of defendant Wheeler, several security guards and other employees who had worked at Lost Isle, and three sheriff's deputies. Van Noy, also known as "Moe," estimated that there were fewer than 10 fights—i.e., "[t]wo guys throwing blows"—in the 15 years he had worked at Lost Isle. Blane Hamilton estimated the number of fights involving physical blows to be "way less [*sic*] than one a year." Dillard, a security guard, had seen about five fights in the three years he had worked there, and "maybe ten" verbal altercations, although during that time guards had removed or asked to leave about 10 patrons for excessive intoxication. Of those five fights, all were "just little pushing matches." On two occasions a person "took a swing at somebody [but] didn't even really hit them. . . . And they were broken up within seconds of it starting." Saculla, another security guard, had broken up "[m]aybe four" fights in the four years he had worked there. Wheeler himself stated that since 1995 when his partnership acquired the resort, there had been about eight to 12 fights a year. The most serious of these had been incidents of punching, and he believed stitches had been required once when someone was hit by a rock. The only other crime Wheeler could recall involved illegal drugs. And Captain John Williams of the San Joaquin County Sheriff's Department believed that the incidence of fights at Lost Isle was "very close in frequency, per capita" to the number at other bars in the area. Neither he nor other witnesses could recall any prior shootings or stabbings at Lost Isle, and a stabbing or shooting was not something Captain Williams had anticipated.

Security guards routinely inspected bags, purses, and backpacks. Once permitted to enter, patrons were given wristbands; but if they went back to their boats, any bag or backpack would again be searched. Two of defendants' security guards, Dillard and

Elizondo, stated that they did not perform bodily inspections of patrons for knives or other weapons because people were wearing attire such as bikinis for women and "board shorts" for men, which afforded easy detection of a weapon. If a pocket looked bulky, the guard would ask what was in it, and if it was something that was not allowed, such as alcohol or a pocket knife, he would require the person to return it to the boat. Bertorelli, who had worked both as a security guard and as a bartender, had "a couple of times" confiscated a fishing knife and gave it back only when the patron returned to his boat. It was "[v]ery rare" that a fishing knife or pocket knife was discovered, however. Blane Hamilton, who acted as a "rover" and helped where needed, stated that he had never found a weapon, so his objective in searching was mostly to discover open containers of alcohol.

Metal detection wands, which plaintiffs contended should have been used regularly, were not used at Lost Isle that year, nor had they been used at most of the other venues at which Dillard had worked. Dillard also testified that the wands did not consistently work. Even Stephen Mettler, a sheriff's deputy in the boating division, doubted whether metal-detecting wands would have been useful, since it was "hard to hide weapons in bikinis and swim trunks." Likewise, pepper spray had been once been used on a "combative customer" who "wouldn't stop being belligerent" even while being escorted out; the pepper spray, however, was ineffective. Instead, it incapacitated the security personnel, including Elizondo.

This evidence, taken together, supported defendants' position on both the extent to which the attack on Joseph was foreseeable and the likelihood that it could have been averted by increased security measures. On this last point, defendants produced the additional material evidence that resort employees had insufficient time to intervene to prevent the stabbing. Before then it had been a "quiet" and "uneventful" day. Ernesto described the altercation as having been between Joseph and another guy, whom he could not identify or describe, who "faced off" with each other; they were "both all puffed up,"

but "nobody had thrown a blow." According to Michael Alarcon, Joseph and "the guy with the long hair" were just talking, with no "loud verbal comments made to each other." David Keenan, who saw the two confronting each other three feet apart with clenched fists, took six to eight steps away before he looked back— maybe "four to five seconds" later—and saw that one of them had been stabbed. Keenan did not think he could have gotten in between the two before they began fighting. Rizzonelli stated that after "Moe" alerted him to a possible fight based on the "[a]ggressive body posture," it took only "a couple of seconds" to reach the pair, which is just when they fell to the ground with punches. The stabbing itself, "three quick jabs," occurred after that "really quick. It was like a couple of seconds." Katherine Hamilton estimated "[m]aybe four seconds" between the time she heard shouting until the time she went to assist the first stabbing victim. And according to Michael Alarcon, it was about 15 seconds from Ernesto's involvement in the standoff and the time security grabbed the man who had stabbed Ernesto. Finally, while bartending Bertorelli saw an injured man walk by him with blood on his side five or six seconds after Bertorelli heard that there was a disturbance.

The testimony of these witnesses supports defendants' assertion that the stabbing of Joseph could not have been foreseen from the altercations with which these employees were familiar, consisting primarily of shouting and, at most, punching. Mettler's estimate that he responded to "at least 50" assaults—"around ten" of which were felony assaults—covered nearly 30 years. Defendants thus provided evidence that the stabbing was not foreseeable and that it could not have been prevented had defendants employed the measures plaintiffs deemed necessary—that is, having "adequate security in place," equipping the guards with working "communication devices" (two-way radios, or "walkie-talkies"), and training them to use "nonlethal crowd control methods like pepper spray."

The evidence adduced by defendants, however, is insufficient to entitle them to judgment if plaintiffs offered responsive evidence of foreseeability and a causal nexus sufficient to demonstrate a triable issue of fact on the issues of duty and causation. We therefore must turn to this step of the summary judgment analysis.

4. Plaintiffs' Opposition

In their opposition plaintiffs' focus was on the existence of prior similar incidents, through their recounting of the history of altercations and alcohol use at Lost Isle. On appeal, plaintiffs correctly observe that it was not necessary for there to have been actual knife attacks in the past to qualify as prior similar incidents and thus heightened foreseeability. (See *Delgado, supra,* 36 Cal.4th at p. 240 [heightened foreseeability is shown by "prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location"].) In their separate statement of disputed and undisputed facts, plaintiffs suggested that defendants had created an environment at Lost Isle "rife with assaults, batteries, and other violent felonious behavior."

The primary source of plaintiffs' proffered evidence of prior similar incidents was the testimony of Thomas Desmarais, a lieutenant (and later, captain) in the San Joaquin County Sheriff's Department. During the pendency of the lawsuit Desmarais reviewed nearly 10 years of "calls for service," which included "incident reports" of "what the person said when they called us." He attempted to categorize those calls "to try to come up with a security plan and come up with reasonable times that maybe the security needs to be increased, maybe days of the week that the security needs to be increased, those sort of things." Some labels were duplicative, depending on how the deputy classified an event—for example, disorderly conduct and disturbing the peace, or assault and battery. In some cases the same incident would result in two different classifications.

Commonly reported was a "disturbance" call, which "generally is some kind of fight where people are yelling and screaming at each other and they are about to get into a fight." He could not, however, verify that these events actually occurred; the sheriff's

department "just received the call on them." One "shots fired" report did not result in any arrest, because there was no witness and it was not clear from where the shots were fired. Desmarais tallied one assault and five batteries over this period of more than eight years. He was not aware of anyone having been shot on Lost Isle. Desmarais did not note any prior stabbings; he recalled only "something with a bottle and somebody being cut," but he did not remember the details.

The superior court properly excluded this evidence; it was clearly hearsay. However, even without it, plaintiffs made a sufficient showing to withstand summary judgment. Although Mettler could not recall any brandishing of knives or firearms on the island between 2003 and 2008, he testified that there were felony assaults during this period, as well as disorderly conduct. The only firearms he and other deputies had recovered were those located on boats, but he did recall a "huge melee" in which someone was hit with a rock, as well as one assault with a beer bottle during that period, and he stated that there were fistfights "all the time." Mettler described the crowd on a typical weekend as an "eight out of ten on the rowdy scale." Blane Hamilton testified that it was standard procedure to "get rid of" the problem of "rowdy" patrons, and Van Noy explained that patrons who were "rowdy" or "overintoxicated" and "causing a nuisance"—that is, "too frisky," or causing altercations or fights—were escorted out.

On this record we must conclude that summary adjudication of the duty element of plaintiffs' negligence claims was unwarranted here. As discussed earlier, foreseeability is generally a question of fact. At Lost Isle, where altercations and excessive alcohol use had been known to occur, security personnel had undertaken to screen patrons for alcohol intoxication and visually inspect them for weapons. Whether functioning walkie-talkies, metal-detecting wands, pepper spray, or any other specific measures would have averted this attack is far from certain, but it cannot be determined at this stage of the litigation without improperly weighing the evidence.

Likewise, plaintiffs' ability to establish the causation element of their causes of action remains to be seen. "In California, the causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant'sbreach of duty (his negligent act or omission) was a substantial factor in bringing about the plaintiff's harm and (2) that there is no rule of law relieving the defendant of liability." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 481.) Even where it exists, foreseeability alone is not enough; "to demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Saelzler*, *supra*, 25 Cal.4th at p. 778.) "Otherwise, defendants might be held liable for conduct [that] actually caused no harm, contrary to the recognized policy against making landowners the *insurer* of the absolute safety of anyone entering their premises." (*Id*. at p. 780.)

Unquestionably, Lost Isle security had a duty "to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally burdensome measures." (*Delgado*, *supra*, 36 Cal.4th at p. 245.) Whether attending staff performed that duty by responding quickly to what appeared to be yet another fistfight about to erupt is for the trier of fact to decide. (See *id.* at p. 247, fn. 26 [bar's duty was to *attempt* to protect patron by separating him from threatening group, not to guarantee his safety, nor even to prevent the attack].) From a foreseeability perspective, whether Joseph's death could have been averted by maintaining a sufficient supply of metal-detecting wands, two-way radios, and pepper spray is also a question of fact for trial.[9]

[9] On appeal, plaintiffs suggest that uniforms worn by all security staff would also have deterred fights. This measure does not appear to have been urged below, however; consequently, the argument on appeal will be disregarded.

In this case, neither party's evidence indicates whether additional equipment and training, even if minimally burdensome to supply, would have protected Joseph from being stabbed. We must bear in mind, as noted earlier, that in summary judgment proceedings "we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing h[is] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler*, *supra*, 25 Cal.4th at p. 768.) We must conclude, therefore, that whether the incident was foreseeable and whether defendants could have prevented it are questions of fact that require determination by a trier of fact.

We express no opinion as to whether plaintiffs will ultimately be able to prove the claims stated in their complaint. Their prospects of recovery may be slight. "But while it also serves the efficient administration of justice to remove a palpably weak case from the system as soon as possible, on a motion for summary judgment we are bound by the statute to distinguish between a case [that] is simply weak and a case [that] 'cannot be established.' " (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 188.) In this case, whether defendants could have foreseen and prevented the stabbing of Joseph by implementing plaintiffs' proposed security measures at Lost Isle may be a matter of speculation, but these are questions for a trier of fact to determine. We simply hold that at this point we cannot say that reasonable minds can come to only one conclusion about the issues presented by plaintiffs' complaint. Accordingly, we must remand the case for trial or other disposition.

Disposition

The judgment is reversed. Plaintiffs are entitled to their appellate costs.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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WALSH, J.*

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*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.